Parsons Electric, LLC *and* International Brotherhood of Electrical Workers, AFL–CIO, Local No. 110.
Case 18–CA–109253

August 18, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND JOHNSON

On April 8, 2014, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed limited cross-exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions, cross-exceptions, and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] and to adopt the recommended Order as modified below.[3]

AMENDED CONCLUSIONS OF LAW

Insert the following after the judge's Conclusion of Law 1 and renumber the subsequent paragraph.

"2. By unreasonably delaying in providing the Union with requested relevant information regarding unit employees' break times, the Respondent violated Section 8(a)(5) and (1) of the Act."

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below, and orders that the Respondent, Parsons Electric, LLC, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b):

(b) Refusing to bargain collectively with the Union by unreasonably delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of the Respondent's employees in the appropriate unit specified in the collective-bargaining agreement between the Respondent and the Union, which agreement is effective through 2015.

2. Substitute the following for paragraph 2(a):

Rescind the changes to the employee break policy contained in the February 20, 2012 employee handbook.

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. August 18, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

[1] The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We correct the following errors in the judge's decision. In fn. 18, the judge states that the Respondent's president and chief executive officer Joel Moryn "conceded a past practice of regular morning and afternoon breaks, unless jobsite circumstances required otherwise," when in fact Moryn testified that the practice was to "accommodate . . . breaks that we thought were needed to facilitate safe and productive work." Also in fn. 18, the judge states that 10 unit employees testified that they were permitted to leave 15 minutes early if they did not get an afternoon break. The record reflects that only Matthew Ohmann, Donald Jorgenson, Erik Metling, and Scott LaPlante so testified; the other six employees did not testify on this point. These errors do not affect our disposition of this case.

[2] In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) and (1) by unilaterally changing the break policy in its employee handbook, we rely on *Rangaire Co.*, 309 NLRB 1043, 1043 (1992), affd. mem. 9 F.3d 104 (5th Cir. 1993), for the proposition that breaks are a mandatory subject of bargaining. We do not rely on *Kerry, Inc.*, 358 NLRB No. 113 (2012), which was cited by the judge for that proposition. See *NLRB v. Noel Canning,* 134 S. Ct. 2550 (2014).

We also do not rely on the judge's statement in fn. 20 that "[t]he General Counsel speculated that the no-break directive in these instances likely issued as retaliation for the filing of the instant charges."

Member Johnson does not rely on the cases cited in the judge's discussion of implied waiver. Chairman Pearce and Member Hirozawa, in adopting the judge's finding that the Union did not impliedly waive its right to bargain over changes to the written break policy, express no opinion on whether *Courier-Journal*, 342 NLRB 1093 (2004), was correctly decided. Further, they clarify that in *Mt. Clemons General Hospital*, 344 NLRB 450 (2005), the Board did not pass on the waiver issue, and in *Litton Microwave Cooking Products v. NLRB*, 868 F.2d 854, 858 (6th Cir. 1989), denying enf. to 283 NLRB 973 (1987), the court, in finding a waiver, reversed the Board's finding that the circumstances did not give rise to a waiver.

There are no exceptions to the judge's finding that the Union did not expressly waive its right to bargain over changes in the break policy.

[3] We shall modify the judge's recommended Order to conform to his unfair labor practice findings and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). We shall also amend the judge's conclusions of law to reflect the violations found.

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers, AFL–CIO, Local No. 110 (the Union) by failing to notify and bargain in good faith with Local 110 as the representative of our employees in the following unit regarding any proposed changes to employees' terms and conditions of employment, including wages, hours and benefits, before putting such changes into effect.

> All journeymen and apprentice electricians covered by the collective bargaining agreement between the International Brotherhood of Electrical Workers Local 110 and the St. Paul Chapter of the National Electrical Contractors Association which expires on April 30, 2015.

WE WILL NOT refuse to bargain collectively with the Union by delaying in furnishing it with requested information that is relevant and necessary to the Union's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the changes to the employee break policy contained in the February 20, 2012 employee handbook.

PARSONS ELECTRIC, LLC

The Board's decision can be found at www.nlrb.gov/case/18-CA-109253 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273–1940.

Abby E. Schneider and *Nichole L. Burgess-Peel, Esqs.,* for the General Counsel.

Alec Beck, Esq. (Ford Harrison), of Minneapolis, Minnesota, for the Respondent.

Jonathan F. Reiner, Esq., of Minneapolis, Minnesota, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Minneapolis, Minnesota on February 4, 2014. The International Brotherhood of Electrical Workers, AFL–CIO, Local No. 110 (the Union) filed the charge and amended charge on July 16 and October 24, 2013,[1] respectively, and the General Counsel issued the complaint on November 21, 2013. The complaint alleges that, (1) since July 13, the Company has failed and refused to provide Local 110 with requested information that is necessary for, and relevant to, Local 110's performance of its duties as labor representative, and (2) in or around February 2012, the Company changed the break policy in its employee handbook without prior notice to the Union and affording the Union an opportunity to bargain with the Company with respect to this conduct in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act).[2]

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company is a corporation with an office and place of business in Minneapolis, Minnesota, where it annually performs electrical contracting services valued in excess of $50,000 in states other than Minnesota. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates are in 2013, unless otherwise indicated.
[2] 29 U.S.C. § 151–169.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company

The Company performs electrical service and repair in the Minneapolis-St. Paul (Twin Cities) metropolitan area. Joel Moryn is the Company's president and chief executive officer; William Olson, vice president of field operations, oversees several superintendents in the St. Paul area. Brad Bacon is the Company's superintendent for the St. Paul area.

Bacon oversees the project managers assigned to each company project in the St. Paul area. Project managers supervise bargaining unit employees: journeymen, foremen, and general foremen. They manage the financial aspects of each job, handle customer service issues and typically develop a list of jobsite expectations for employees at each project location. Project managers, foremen and general foremen all have duties regarding scheduling hours of work and breaks, and they make those decisions in conjunction with the crew, customer, project manager, and general contractor.[3]

Jobsite expectation sheets are frequently, but not always, distributed to employees on jobsites. They contain project and work guidelines, including work hours and breaks, parking information, and special safety information. These jobsite expectations reflect site owners' needs and requests, the Company's written policies, and jobsite conditions.[4] Jobsite expectation sheets are not used on every job, and even when they are used, they do not always include information about breaks.

B. NECA

The Company is one of 41 employer-members of the St. Paul Chapter of the National Electrical Contractors Association (NECA), which serves as its bargaining representative with various labor organizations. As an employer-member bound by NECA's Bylaws, the Company delegates to NECA exclusive responsibility for negotiating and administering its collective-bargaining agreements with unions:

> Delegation of Bargaining Rights to the Chapter
>
> Section 12. The authority to negotiate agreements, effective within the jurisdiction of this Chapter with labor organizations encompassing wages, hours, working and other conditions affecting employees is expressly and exclusively delegated to the Chapter. No regular or temporary member of this Chapter shall independently enter into any such agreement with a labor organization. Agreements on these subjects negotiated by the Chapter shall be binding upon all regular and temporary members of this Chapter.[5]

C. The Union

Local 110 is a labor organization that represents electricians in and around St. Paul. Its counterpart, IBEW Local 292, represents electricians in nearby Minneapolis, Minnesota. Brian Winkelaar, Local 110's business agent, has administered Local 110's contracts with the Company since 2005. He reports to Jamie McNamara, Local 110's business manager/financial secretary.[6]

The Company has had a collective-bargaining relationship with Local 110 spanning at least 50 years. It is the exclusive bargaining representative for the following unit employees:

> All employees performing electrical construction work within the jurisdiction of the International Brotherhood of Electrical Workers Local Union No. 110 on all present and future jobsites.[7]

In a letter of assent, dated October 29, the Company authorized NECA as its collective-bargaining representative for all matters contained in any "Inside Construction Agreement" between NECA and Local 110.[8] The most recent agreement between NECA and Local 110 covers the period of July 16, 2012 to April 30, 2015 (the CBA).[9]

The CBA includes a Management Rights provision defining the scope of the Company's rights to make unilateral changes at article II, section 2:

> The Union understands the Employer is responsible to perform the work required by the owner. The Employer shall, therefore, have no restrictions except those specifically provided for in the collective bargaining agreement, in planning, directing and controlling the operation of all his work, in deciding the number and kind of employees to properly perform the work, in hiring and laying off employees, in transferring employees from job to job within the Local Union's geographical jurisdiction, in determining the need and number as well as the person who will act as Foreman, in requiring all employees to observe the Employer's and/or owner's rules and regulations not inconsistent with this Agreement, in requiring all employees to observe all safety regulations, and in discharging employees for proper cause.[10]

The CBA covers all work within Local 110's jurisdiction. This work generally includes electrical installation and maintenance for both new commercial construction and renovation projects. Local 110 has a job steward at each site to handle disputes between trades, unit employees and the Company, and occasionally communicates site information to Local 110's business agent or manager.[11]

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[3] The distinction between foremen and general foremen, who are usually assigned to larger projects, are insignificant with respect to the issues at hand. (Tr. 113, 125–126, 181, 190–191, 201.)

[4] Olsen conceded that job expectation sheets do not always reflect whether employees will have breaks or the applicable times for any breaks. (GC Exh. 8; Tr. 126, 278–279.)

[5] R. Exh. 12 at art. XI, sec. 12.

[6] I gave the testimony of Winkelaar and McNamara little weight as to the Company's custom and practice within the past 5 years. Winkelaar last worked on a Company project in 2004 or 2005 (Tr. 25.), while McNamara has never worked for the Company. (Tr. 83.)

[7] GC Exh. 2.

[8] GC Exh. 3.

[9] GC Exh. 2.

[10] Id. at 11.

[11] Scott LaPlante and James Shult, electricians and job stewards called as witnesses by the Company, provided credible testimony as to whether they informed Local 110 officials of the written change to the break policy. LaPlante did not inform Local 110 of the change (Tr. 212–215), while Shult testified that it would have been his practice to send the new break policy to Local 110, but he could not recall if he

The Company generally bargains directly with the NCEA, but occasionally deals directly with Local 110 on issues relating to the administration of individual projects. For example, Bacon recently approached McNamara about an oil refinery owner's requirement that unit members obtain Department of Homeland Security credentials. McNamara agreed to submit his members to the security credential processing provided the Company reimburse employees for the cost of obtaining the credentials. NECA did not participate in the negotiations and was advised of the agreement by Local 110 after the fact.[12]

D. The Company's Past Practice Regarding Employee Breaks

1. The prior written break policy

The CBA is silent on the issue of breaks, but describes an 8.5 hour work day at of work at Article VI, Section 1(a).[13] However, Company employees are provided with an employee handbook that is updated from time to time to address changes in Company policies or comply with employment laws and regulations.[14] The 2009 employee handbook contained a provision reflecting employee breaks in effect between 2005 and February 2012:

> It is the policy of Parsons Electric to provide all hourly personnel with a 15 minute break in the morning and a 15 minute break in the afternoon of each workday. Each jobsite will establish specific break policies as part of the jobsite expectations and the policy may be materially different than the standard break duration described above. Under no circumstances are these breaks to be substituted for a reduced work day without permission from Parsons President. . . . Collective bargaining agreements that provide for an alternative break policy supersede [sic] the above policy.[15]

2. The past practice at the Company's jobsites

Prior to February 2012, Company practice permitted project employees to take one 15-minute break in the morning and another in the afternoon unless they were told otherwise. Employees were also permitted to leave 15 minutes early at 3:15 p.m. in lieu of an afternoon break.[16] Some employees, on the other hand, have never been told to forgo afternoon breaks.[17]

The decision of whether to break, breaktimes and early departures were determined by the Company's project managers and foremen based on several factors, including the employee handbook policy, site owner and general contractor requests, and jobsite conditions.[18] In 2013, however, the practice began to change on some projects. On the Target Data Center project, for example, employees were neither permitted afternoon breaks nor an early departure.[19]

On two projects after the filing of charges, Bacon communicated to project managers that the Company neither permitted employees to take an afternoon break nor allowed them to leave at 3:15 p.m. One was the Bielenberg Sports Center project. The other instance involved the Cabella's Retail Center project.[20]

E. The February Changes to the Break Policy

On February 20, 2012, the Company notified "Union Employees Only" that it issued "Updates" to the employee handbook, including updates to the "Break Policy." Employees were directed to review and sign an acknowledgment receiving each policy.[21] The revised break policy attached stated:

> Parsons Electric abides by the applicable collective bargaining agreements and laws with respect to all breaks. In the absence of specific provisions for breaks in the collective bargaining agreement, Parsons may establish specific break policies as part of the jobsite expectations."[22]

The February 2012 changes to the employee handbook were disseminated to employees at or around that time.[23] However,

did. (Tr. 209–211.) Based on the foregoing, I find that there was insufficient credible evidence to establish that anyone in the field informed Winkelaar or McNamara of the written policy change.

[12] Local 110 did not provide any other evidence demonstrating that direct negotiations between it and the Company ever went beyond a credentialing requirement on a project and into other terms and conditions of employment such as wages, hours worked and breaks. (Tr. 285–287.)

[13] GC Exh. 2 at 34.

[14] The Company does not dispute that the August 27, 2009 handbook update revising the Company's EEO, nonharassment and sexual harassment policies was issued without notice to Local l10. (GC Exh. 8 at 20; Tr. 38.)

[15] The parties do not dispute that the break policy language in effect since at least 2005 was still in effect when the Company issued its 2009 employee handbook. (GC Exh. 8 at 23.)

[16] See, for example, the "jobsite rules" for the Wells Fargo project, where employees not provided with an afternoon break, but were permitted to leave at 3:15 p.m. (R. Exh. 8 at 3.)

[17] This finding is based on the credible and undisputed testimony of unit employees Richard Boss, Mark Weiss, and Scott LaPlante. (Tr. 168, 218–219, 220, 222–223.)

[18] The remaining testimony between managerial and unit employees, however, was fairly consistent regarding this past practice. Moryn conceded a past practice of regular morning and afternoon breaks, unless jobsite circumstances required otherwise. (Tr. 126, 137–146.) Olsen initially did not know whether it would be rare for employees not to get a morning break, but was impeached with his sworn affidavit to the contrary (Tr. 115–117) and subsequently conceded that he was not entirely familiar with Company practice regarding afternoon breaks. (Tr. 281–282.) Bacon testified that the Company's general practice was to give afternoon breaks or permit employees to leave 15 minutes early. (Tr. 240–244.) Unit employees Matthew Ohmann, Richard Boss, Patrick Hanson, Don Jorgenson, Scott LaPlante, Erik Metling, James Schult, Paul Stelter, Mark Weiss, and Daniel Youness, all currently-employed journeymen electricians who have served as foremen or general foremen, were called by the Company and consistently testified that they were permitted to leave 15 minutes early if they did not get afternoon breaks. (Tr. 158–159, 166, 170–171, 173–178, 185, 189, 193–196, 198–201, 205, 218–220, 222–223.) One exception was where employees worked a third shift overnight. (Tr. 172–173.)

[19] That practice recently changed and employees were directed to work until 3:25 p.m. (Tr. 160, 162, 190–192, 206–207; GC Exh. 8 at 5.)

[20] The General Counsel speculated that the no-break directive in these instances likely issued as retaliation for the filing of the instant charges. (Tr. 160, 162–163, 190–192, 206.)

[21] R. Exh. 5–6, 13.

[22] GC Exh. 8 at 18.

[23] Stewards James Schult and Scott LaPlante testified that they signed a February 2012 document written by Respondent and directed

Local 110 did not learn about the changes until April 2013. At or around that time, Winkelaar learned that Local 110's Minneapolis counterpart, Local 292, grieved the loss of afternoon breaks on certain projects. After Winkelaar confirmed with Local 110 unit employees that they were not being given afternoon breaks or permitted to leave early, Local 110 grieved the change.[24]

F. Union Information Requests

On July 1, Local 110 requested in writing that the Company provide it with copies of job expectation sheets for the Target Data Center project and any other jobs within Local 110's jurisdiction.[25] Although potentially involving a voluminous amount of information, the Company simply forwarded the request to counsel and did not respond to Local 110.[26]

On July 17, the Union submitted an additional written request for the following information by July 24:

> Provide the dates on which your company eliminated, modified, or rescheduled any break times for electricians within Local 110's jurisdiction and the name and the address of the projects(s) on which such breaks were eliminated, modified or rescheduled.
>
> A copy of any communications, including but not limited to, email, text messages, letters, memos, or other correspondence, internally within your company, or with any customer, contractor, end user, project owner, or client, or with any St. Paul Chapter NECA representative or employee regarding the following subjects: (1) elimination, rescheduling, or modification of break times for electricians and/or (2) a requirement that employees sign or abide by Job Site Expectations or other documents that govern terms and conditions of employment for electricians but were not negotiated with Local 110.[27]

On July 24, the Company provided the Union with a partial response. The information included the date it changed the employee handbook break policy, excerpted portions of the 2009 and 2013 handbooks dealing with the employee break policy, and jobsite expectation sheets signed by unit members working at a Company site. Those jobsite expectation sheets indicated that the afternoon break was omitted and the forms contained employees' signed acknowledgements that there had been a change to the break policy in the employee handbook.[28] Upon reviewing the 2013 employee handbook, Local 110 learned for the first time of the change to the break policy in employee handbook.[29]

On July 31, Local 110 requested outstanding information relating to breaktimes given to unit employees.[30] On January 31, 2014, 6 months later, the Company, through its hearing counsel, provided the Union with "additional documents" responsive to the Union's July 31, 2013 information request.[31]

G. Union Files Grievances

Local 110 filed a grievance on May 1 after learning that the Company was not giving afternoon breaks. The grievance demanded that the Company revert to the previous break policy language and bargain over any changes to the break policy or other terms and conditions of employment.[32]

Local 110's grievance proceeded through the CBA's grievance and arbitration process. It was initially referred to the Labor-Management Committee (LMC), which is composed of an equal number of Company and Local 110 representatives. The Company's written reply to grievance relied on the "Management Rights" clause contained in the CBA:

> Parsons Electric has the exclusive right to determine how many breaks our employees are provided within the parameters of state and federal labor laws.
>
> Parsons Electric has the exclusive right to determine when these breaks or break are taken.
>
> Parsons Electric has the exclusive right to determine the quantity, time and duration of these breaks on a job by job basis.
>
> Each of our projects can and will be treated as independent projects and are subject to our discretion on each of the above exclusive rights.
>
> Parsons Electric has the right to instruct OUR employees on specific jobsite requirements to ensure the highest level of safety, productivity, and professionalism.
>
> Parsons Electric believes that we have observed to the best of our abilities the rights and obligations of the letter of assent to the contract we have with IBEW Local 110.
>
> We expect these grievances to be dismissed based on the Management Rights clause of the collective bargaining agreement and defend these Rights with all means available to us for the god of the industry and our employees fu-

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to all union employees, stating that Respondent had updated its break policy in the employee handbook. (R. Exhs. 5, 6.) However, Schult did not recall reading the document before signing it or taking it back to the union hall after signing it, and LaPlante only briefly read the document and did not have a practice of taking such documents to the union hall. (Tr. 211, 217.) LaPlante further testified that he did not need to tell anybody at the Union about a change to the break policy because he heard it from the union hall in the spring of 2013. (Tr. 217.)

[24] Winkelaar's testimony as to how he first learned of the changes was credible and unrefuted. (Tr. 28-29, 37–39, 72, 88, 101; GC Exhs. 4–5.)

[25] GC Exh. 6.

[26] Given the testimony as to the number of projects, employees and days for which sheets were requested, I credit Olsen's testimony that the requested information was voluminous. He made no effort to get the information, however, and simply forwarded the request to counsel. (Tr. 263.)

[27] GC Exh. 7.

[28] The initial break policy quoted above in Section II(B)(1) is the same one contained in the 2009 employee handbook. The new break policy, implemented in February 2012, is contained in the 2013 employee handbook Respondent provided to the Union in response to the Union's second information request. (GC Exh. 8.)

[29] I credit Winkelaar's unrefuted testimony that he had no knowledge of the change prior to that date. (Tr. 35–36, 39, 42–43, 86–87.)

[30] GC Exh. 9.

[31] Olson provided no credible explanation for the delays, except to suggest that the filing of charges were a factor. (GC Exh. 14; Tr. 60, 94, 272–273, 278.)

[32] GC Exh. 4–5.

> ture. We appreciate the LMC's time today nonetheless, however, are also very troubled that the filing of these grievances has wasted so much of everyone's valuable time and money. We hope the LMC can find ways to direct this time in a more industry serving manner which positions our contractors and employees to be successful in an extremely competitive marketplace.[33]

The LMC met on July 30. Winkelaar presented Local 110's position in writing supported by job expectation sheets from the Target project. He argued that the absence of any provision for afternoon breaks in the job expectation sheets was inconsistent with past practice and requiring unit employees to sign the sheets was tantamount to negotiating directly with them. Company representatives emphasized its management rights and denied that the sheets provided any basis for removing employees from a job or terminating them.[34] However, the assertion that employees would not be disciplined for refusing to sign the sheets was contradicted by the statement preceding each signature: "I understand that violating any of these expectations may result in my removal from the jobsite."[35] The LMC deadlocked.

In accordance with the CBA, the grievance was then presented to the Council on Industrial Relations (CIR) in November 2013.[36] The Company continued to maintain its position that it need not bargain over the change to the break policy in the employee handbook. CIR determined that the Company did not violate the CBA. However, none of the steps of the grievance/arbitration procedure addressed whether there had been a unilateral change to the break policy in the employee handbook in violation of the Act.[37]

LEGAL ANALYSIS

I. UNILATERAL CHANGES TO THE BREAK POLICY

The General Counsel and the Union contend that the Company violated Section 8(a)(5) and (1) of the Act when the Company unilaterally changed its break policy in the employee handbook without prior notice to the Union and without affording the Union an opportunity to bargain with the Company. The Company denies that it made a unilateral change when it altered the employee handbook and was simply updating its written policy to reflect its past practice.

Section 8(a)(5) of the Act requires that employers bargain collectively with employees' representatives. Accordingly, it is unlawful for an employer to make unilateral changes to benefits that are mandatory subjects of bargaining. *NLRB v. Katz,* 369 U.S. 736, 737 (1962). An employer's unilateral change in the conditions of employment is a "circumvention of the duty to negotiate which frustrates the objectives of 8(a)(5)." Id. at 743.

Not every unilateral change, however, violates the Act. In *Golden Stevedoring Co.,* the Board explained that a unilateral change must be a "material, substantial, and significant one affecting the terms and conditions of employment of bargaining unit employees." 335 NLRB 410, 416 (2001) (change must have a significant impact on employees' working conditions). Section 8(d)[38] defines the duty to bargain collectively as the duty to "meet and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz,* 369 U.S. at 742–743 (1962). The Board has held that scheduling breaks falls under the category of "hours." *Kerry, Inc.,* 358 NLRB No. 113, slip op. at 11 (2012).

The Company asserts that the employee handbook reflected a past practice and did not substantially or significantly change the employees' scheduling. However, the change did alter the handbook with respect to employee hours, which the Board has held is a term and condition of employment. *United Cerebral Palsy of New York City,* 347 NLRB 603 (2006) (employer's unilateral changes to employee handbook violated the Act because they affected terms and conditions of employment, which were mandatory subjects of bargaining); *Kendall College of Art,* 288 NLRB 1205 (1988) (employer violated the Act when it unilaterally "treated" provisions in its employee handbook). Thus, regardless as to whether it actually modified employee hours, the change itself amounts to a unilateral change. The change related to a term and condition of employment, which in turn is a mandatory subject of bargaining notwithstanding the past practice discussion.

A. Implied Waiver

The Company advances several theories in its defense. The first is a general waiver theory premised on a longstanding practice as a continuation of the status quo. The Board has held that "a unilateral change made pursuant to a longstanding practice is essentially a continuation of the status quo—not a violation of Section 8(a)(5)." *The Courier-Journal,* 342 NLRB 1093, 1095 (2004) (finding that employer's unilateral modification of health insurance premiums was a lawful continuation of the status quo in light of a long history of similar unilateral changes and contract empowered employer to modify or terminate health care plan).

In *Mt. Clemons General Hospital,* an employer made unilateral changes to a tax shelter annuity program, shrinking it from five providers to one. The Board recognized an implied waiver from the employer's 20-year record of making similar unilateral changes without requesting that the Union bargain over them, 344 NLRB 450, 460 (2005); see also *Litton Microwave Cooking Products v. NLRB,* 868 F.2d 854, 858 (6th Cir. 1989) (finding an implied waiver when the management rights clause was included in a contract explicitly referring to layoffs along with a history of uncontested work relocation and layoffs); *California Pacific Medical Center,* 337 NLRB 910, 914 (2002) (finding an implied waiver based on a management rights clause providing the employer with the right to lay off employees whenever necessary, coupled with a longstanding practice

[33] GC Exh. 11.
[34] GC Exh. 10 at 1–3.
[35] GC Exh. 8 at 7–14.
[36] GC Exh. 12.
[37] GC Exh. 13; Tr. 58, 271.

[38] Sec. 8(d) states, in part: "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."

of uncontested actions and absent requests to bargain).

Here, the testimony of supervisory and unit employees called by the Company established that, prior to February 2012, there was a fairly consistent past practice of regular morning and afternoon breaks, unless the jobsite expectations required otherwise. This past practice enabled project employees to take one 15-minute break in the morning and one in the afternoon unless they were instructed otherwise. Also as a matter of past practice, if employees were instructed to forgo an afternoon break, they were permitted to leave 15 minutes early. This past practice was consistent with the past written break policy since there were generally two breaks per day and, to the extent that an afternoon break was eliminated, employees were dismissed 15 minutes early. To the extent that the written policy required the Company president's permission for early dismissals, such permission was either granted or simply waived by the Company, since the past practice of early departures was commonplace in the absence of afternoon breaks. The new written policy, therefore, does not embody a longstanding practice; it eliminates it. Instead of an expectation that they will have a morning break and an afternoon break or, alternatively, early departure, employees are now bound by a written policy which diminishes the role of breaks as a term of employment by leaving the daily decision up to the unfettered discretion of the supervisor. A defense of implied waiver is nonexistent here.

B. Clarification Exception

The Company alternatively argues that the handbook changes merely clarified past and current practice and do not give rise to a bargaining obligation. *Allied Mech. Servs., Inc.,* 320 NLRB 32 (1995), enfd. 113 F.3d 623 (6th Cir. 1997) (no violation where employer issued a written clarification of existing pay policy in the employee handbook). Here, the Company's former employee handbook provided for morning and afternoon breaks, with the caveat that each project site establish a specific break policy consistent with that project's job expectations. While each jobsite supervisor could deviate from the "standard break duration" based on jobsite expectations, decisions to forgo a break in exchange for a reduced work day required the Company president's permission. As previously noted, however, such permission was either routinely granted or waived by the Company since the past practice of early departures was a common occurrence.

The new written break policy provides project managers and/or foremen with broad discretion in allowing for breaks, while the previous written policy and past practice specifically permitted two breaks or a morning break and an early afternoon departure. The former hardly clarifies the latter. However, to the extent that the new policy purports to clarify that unit employees are not entitled to breaks, it ignores a prior written policy and past practice that informed unit employees that they could expect daily breaks and/or early departure, unless jobsite circumstances required adjustments. This theory also lacks merit.

C. Express Waiver

Citing *Olin Corporation,* 268 NLRB 573, 586 (1984), the Company advances an express waiver argument based on the inclusion of a reservation of rights clause in the CBA in conjunction with "extrinsic evidence of surrounding circumstances." Specifically, the Company suggests that Local 110 expressly waived its entitlement to bargain over the changes by waiting over a year before bringing the issue to the bargaining table" when unit employees, including job stewards LaPlante and Shult were provided with the February 2012 employee handbook in March 2012. That argument fails for several reasons.

An express waiver occurs when a union knowingly and voluntarily relinquishes its right to bargain about a term and condition of employment and cedes full discretion to the employer on such a matter. However, the Board narrowly construes waivers and has been hesitant to imply waivers not explicitly mentioned in the parties' collective-bargaining agreements. *Mississippi Power Co.,* 332 NLRB 530 (2000), enfd. in part 284 F.3d 605 (5th Cir. 2002) (rejecting employer's waiver argument that the unions incorporated the benefit plans' reservation of rights clauses into the contract based on a "course of conduct" of copies of the benefit plans provided to the unions and incorporated into the collective-bargaining agreements). See also *Dept. of the Navy Marine Corps Logistics Base v. FLRA,* 962 F.2d 48, 57 (D.C. Cir. 1992) (construing waiver narrowly); *Metropolitan Edison Co. v. NLRB,* 460 U.S. 693 (1983) (holding that a union may waive its protected rights to bargain over a mandatory subject, but the waiver must be clear and unmistakable).

In order to establish the existence of a clear and unmistakable waiver, the Board considers several factors: (1) the contract language, (2) the parties' past dealings, (3) the relevant bargaining history, and (4) other bilateral changes that may illuminate the parties' intent. *See Johnson-Bateman,* 295 NLRB 180, 184–197 (1989); *American Diamond Tool,* 306 NLRB 570 (1992). The party that asserts the waiver bears the burden of establishing a waiver. *Pertex Computer,* 284 NLRB 801 fn. 2 (1984).

The CBA's reservation rights clause, couched in general terms ("except those specifically provided in the collective-bargaining agreement"), lacks the specificity needed to establish an express waiver. See *Provena Hosps.,* 350 NLRB 808 (2007); *Charles S. Wilson Memorial Hospital,* 331 NLRB 1529, 1530 (2000). With respect to the remaining factors of a waiver analysis, there is an absence of circumstantial evidence of bargaining history and other changes to support a clear and unmistakable waiver by Local 110. There is, however, an abundance of past dealings.

With respect to past dealings, the parties presided over a past practice where unit employees regularly received a morning break and an afternoon break or permission for early departure. Moreover, there is no credible evidence that either LaPlante or Shult notified Local 110's administrators of the new written policy change when the new employee handbooks were distributed in 2012. Nor did knowledge of the written policy change on their part impute notice to Local 110 simply because they were job stewards.

Thus, Local 110 did not learn of the unilateral changes until Local 292 reported the changes on Minneapolis projects, leading Local 110 to canvass unit employees within its jurisdiction

and confirm its suspicions. Nor was Local 110 provided with a copy of the new employee handbook until the Company responded to an information request on July 24. Under the circumstances, Local 110 did not waive its right to insist on bargaining over changes to unit employee's breaktimes.

II. LOCAL 110'S INFORMATION REQUESTS

The General Counsel and Local 110 further allege that the Company unlawfully delayed providing information to the Union in violation of Section 8(a)(5) and (1). The Company does not contest the relevance of the information request under the CBA, but contends that it undertook best efforts to provide the requested information.

Section 8(a)(5) states that it is an unfair labor practice for an employer to "refuse to bargain collectively with the representatives of his employees." Since the Act's purpose is to "equalize bargaining power between employees and employers [it] does not permit an employer to secure, even unintentionally, a dominant position at the bargaining table by means of unreasonable delay." *Burgie Vinegar Co.,* 71 NLRB 829 (1946) (finding that employer violated Section 8(5) by initially refusing to negotiate with the Union for nearly 6 months, notwithstanding the serious illness of the employer's president).

The Board has held that an employer must respond to requests for information in a timely fashion. *The Earthgrains Co.,* 349 NLRB 389 (2007). "An unreasonable delay in furnishing such information is as much as a violation of Section 8(a)(5) of the Act as a refusal to furnish the information at all." Id. The Board has set forth the standard for evaluating a claim of unreasonable delay as follows:

> In determining whether an employer has unlawfully delayed responding to an information request, the Board considers the totality of the circumstances surrounding the incident. Indeed, it is well established that the duty to furnish requested information cannot be denied in terms of a per se rule. What is required is a reasonable good faith effort to respond to the request as promptly as circumstances allow. In evaluating the promptness of the response, the Board will consider the complexity and extent of information sought, its availability and the difficulty in retrieving the information. *Amersign Graphics.Inc.,* 334 NLRB 880, 885 (2001).

On July 1, Local 110 sent the Company a written request to provide it with copies of job expectation sheets for the Target Data Center project along with any other jobs within Local 110's jurisdiction. The Company ostensibly did not reply and Local 110 sent an additional request on July 17. On July 24, the Company provided a partial response, including excerpted portions of the employee handbook detailing the break policies. On July 31, Local 110 followed up on that partial response by insisting on the outstanding information relating to the breaktimes of unit employees. The Company failed to provide the information until January 31, 2014, six months later.

An unexplained and unjustified 6-month delay in providing relevant information requested under a collective-bargaining agreement clearly runs afoul of the Act. In *Comar, Inc. and United Steel, Paper and Forestry, Rubber, Mfg., Energy, Allied Industrial,* the Board reviewed the information produced 4 months after the union requested it and found that it could have been prepared within a few days or weeks of the union's request and caused an unreasonable delay, 349 NLRB 342 (2007). As was the case here, the employer did not introduce any evidence to show that the information "was particularly complex, voluminous, or burdensome to provide." Id at 353–354 (explaining that the Board has consistently found delays significantly less than 4 months unreasonable) see *Pan American Grain Co.,* 343 NLRB 318 (2004), enfd. in relevant part 432 F.3d 69 (1st Cir. 2005) (holding a 3-month delay as unreasonable); *Bundy Corp.,* 292 NLRB 671 (1989) (holding that a delay of 2.5 months violates the Act) see also *Arkansas Rice Growers Cooperative Assn.*, 165 NLRB 577, 585 (1967).

Under the circumstances, the Company's delayed response of 6 months in providing requested relevant information regarding unit employees' breaktimes violated Section 8(a)(5) and (1).

CONCLUSIONS OF LAW

1. By unilaterally changing unit employees' break policy in the employee handbook on February 20, 2012, the Company has engaged in unfair labor practices in violation of Section 8(a)(5) and (1) of the Act.
2. The aforementioned unfair labor practices affected commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. I shall order the company to provide the requested information that has been provided and, upon request by Local 110, rescind the February 20, 2012 changes made to the employee handbook and post an appropriate notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[39]

ORDER

The Respondent, Parsons Electric LLC, Minneapolis, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with International Brotherhood of Electrical Workers, AFL–CIO, Local No. 110 regarding any proposed changes to unit employees' terms and conditions of employment, including wages, hours and benefits, before putting such changes into effect.

(b) Refusing to bargain collectively with International Brotherhood of Electrical Workers, AFL–CIO, Local No. 110 with requested information that is relevant and necessary to its role as the exclusive collective-bargaining representative if the employees in the appropriate unit specified in the collective-bargaining agreement between the Company and Local 110, which agreement is effective through 2015.

[39] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) If requested by Local 110, rescind the 2012 changes to the employee handbook relating to employee breaktimes.

(b) Within 14 days after service by the Region, post at its St. Paul, Minnesota project sites, copies of the attached notice marked "Appendix."[40] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since February 20, 2012.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 18 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Company has taken to comply.

Dated: Washington, D.C. April 8, 2014

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to bargain collectively with the International Brotherhood of Electrical Workers, AFL–CIO, Local No. 110 (Local 110) by delaying in furnishing it with requested information that is relevant and necessary to Local 110's performance of its functions as the collective-bargaining representative of our unit employees.

WE WILL NOT refuse to bargain collectively with Local 110 by failing to notify and bargain in good faith with the representative of our employees in the following unit regarding any proposed changes to terms and conditions of employees' terms and conditions of employment, including wages, hours and benefits, before putting such changes into effect.

> All journeymen and apprentice electricians covered by the collective bargaining agreement between the International Brotherhood of Electrical Workers Local 110 (Union) and the St. Paul Chapter of the National Electrical Contractors Association which expires on April 30, 2015.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, if requested by Local 110, rescind the changes to the employee break policy contained in the February 20, 2012 employee handbook.

PARSONS ELECTRIC LLC

[40] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."